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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 949

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; LURLEEN BURNS WALLACE, Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVIS, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON, SR., Director, Dallas County, Department of Pensions and Security, individually and in their official capacities,

Appellants,

—against—

MRS. SYLVESTER SMITH, individually and on behalf of her minor children, IDA ELIZABETH SMITH, ERNESTINE SMITH, WILLIE LOUIS SMITH and WILLIE JAMES SMITH and on behalf of all other mothers of needy, dependent children similarly situated,

Appellees.

MOTION OF THE CHILD WELFARE LEAGUE OF AMERICA, INC. AND THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U. S. A. FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES' POSITION, WITH THE PROPOSED BRIEF ATTACHED

HELEN L. BUTTENWIESER
Attorney for Amici Curiae
1 East 44th Street
New York, New York 10017

EPHRAIM LONDON
Of Counsel

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Appellees.

Motion for Leave to File a Brief *Amici Curiae*

The Child Welfare League of America, Inc. and the National Council of Churches of Christ in the U. S. A. move for leave to file a brief *amici curiae* in this case. The Appellees consent, and the Appellants refused to consent, to the filing of the proposed brief.

This appeal involves the constitutionality of a Regulation adopted by the State of Alabama. The Regulation, as interpreted, denies financial aid to needy children if their mother cohabits "regularly, frequently or continuously" with an able-bodied man. The Regulation applies even if the man does not contribute, and is unable to contribute, to the children's support, and does not live with the mother or the children, and has never entered their home.

The National Council of the Churches of Christ in the U. S. A. is a membership corporation organized under New York law. It represents 34 Protestant and Orthodox Churches in the United States and the churches represented by the Council have a total membership of approximately 42 million people. The Council believes it has the duty to present its position on the issues in this case, which issues so directly and adversely affect the lives and subsistence of children in need.

The Child Welfare League of America, Inc. is a national, non-sectarian federation of 360 child welfare agencies in the United States and Canada. It also is organized under the New York Membership Corporation Law. The League devotes its efforts to the improvement of services for deprived, neglected, dependent children in the United States. It functions by providing leadership and services to child welfare agencies and organizations. The Child Welfare League seeks to file a brief in this case because it considers the Alabama regulation an unconstitutional invasion of basic rights the League is dedicated to protect.

The brief attached does not present the issues in the same way as the Appellees did in their brief to the Court below, and the *Amici* present a related issue not discussed in Appellees' brief—namely, the right of indigent children to be sustained by the government. The existence of that

right is relevant to the disposition of this appeal for the case involves the validity of a Regulation that deprives destitute children of government aid. It is believed that a contribution is made by the *Amici* brief and the Court is respectfully requested to accept and consider it.

Respectfully submitted,

HELEN L. BUTTENWIESER
Attorney for Amici Curiae
1 East 44th Street
New York, New York 10017

EPHRAIM LONDON
Of Counsel

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Appellees.

Brief of the Child Welfare League of America, Inc. and the National Council of Churches of Christ in the U. S. A. *Amici Curiae*, Supporting the Position of the Appellees

HELEN L. BUTTENWIESER
Attorney for Amici Curiae
1 East 44th Street
New York, New York 10017

EPHRAIM LONDON
Of Counsel

On the Brief

HELEN L. BUTTENWIESER
EPHRAIM LONDON

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The Constitutional Provision, Statutes and Regulation Involved

The 14th Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Social Security Law, 42 U. S. C. §601:

> §601. Appropriations
>
> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made avail-

able under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U. S. C. §606:

§606. Definitions

When used in this subchapter—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, * * * in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or * * *.

The Regulation:

Pt. I, Ch. II, Subd. V (A) of the Alabama Manual of Public Assistance Administration:

V. *Child Ineligible If There Is a Father or Mother Substitute.*

A. *Father Substitute*: An able-bodied man, married or single, is considered a substitute father of *all* the children of the applicant/recipient mother living in her home, whether they are his or not, if: (1) he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation; or (2) though not living in the home regularly, he visits frequently for the purpose of cohabiting with the

child's natural or adoptive mother; or (3) he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere. Pregnancy or a baby six months or under is prima facie evidence of a substitute father as indicated above.

When there appears to be a substitute father, disapprove an application or terminate aid unless the mother establishes that one of the following situations exists: (1) she and/or the substitute father meets the criteria of disability as described under "Physical or Mental Incapacity"; (2) the substitute father is no longer living in the home or visiting the home for the purpose of cohabiting with her; or (3) the relationship is broken between the mother and a man who has not been living in the home or frequenting the home. • • •

Statement of the Case

The Appellee, Mrs. Sylvester Smith, is a resident of Selma, Alabama, where she lives with her four children (242).* The father of three of the children died in 1955 (46). The father of the fourth child has been absent for several years and does not contribute to his child's support (46). At the time this action was instituted, the oldest of the four children was 14 and the youngest was 9 (42, 242).

For a period of years before October 1966 Mrs. Smith and her children received financial aid under a public wel-

* Unless otherwise indicated, numbers in parentheses refer to corresponding pages of the Appendix filed in this Court by the Appellees.

fare program administered by the State of Alabama (44, 4). The Alabama program was and is supported by Federal grants made under the Social Security Act (42 U. S. C. §§ 301-1396d) which provides, in part, for Federal appropriations to aid dependent children living at home (42 U. S. C. § 601). A dependent child is defined by the Act as a needy child who has been deprived of parental support because of the death, incapacity or absence of a parent. A child, to fall within the definition, must be living at home with his parent, grandparent or other near relative (42 U. S. C. § 606).

Concededly the Smith children were dependent children within the definition of the Social Security Act (44). Without the moneys received from the Alabama Welfare Department Mrs. Smith and her children did not have enough money to live "in health and decency" (46). In October 1966 Mrs. Smith was notified that she and her children were no longer eligible to receive financial aid (16). The support payments were terminated under the Alabama Regulation set forth at pages 2-3 of this brief (hereafter referred to as the Regulation) because the Alabama Welfare Department had information that Mrs. Smith was having sexual relations during weekends with a Mr. Williams (131, 44). Mr. Williams is married and the father of nine children, eight of whom live with him and his wife (46). Mr. Williams' income was insufficient to support his own family (247). He was not the father of any of Mrs. Smith's children (252), had not contributed in any way to their support, and was unable to do so (46, 247).

It must be stressed that there is no claim that the Smith children were aware of the nature of Mr. Williams' interest in their mother, or that they were exposed to or witnessed

any immoral behavior, or that their home was in any way unsuitable. It is not claimed that any of the welfare payments made to Mrs. Smith were used for any purpose other than for the care and support of the children (See Applts. Brief, p. 6).

The Court below found that approximately 16,000 Alabama children were deprived of financial assistance to which they were otherwise entitled, as a result of Alabama's application of the Regulation (57).

After the welfare payments were stopped, Appellees brought action in the United States District Court to enjoin the enforcement of the Regulation on the ground that it is unconstitutional. A 3-judge court found the Regulation unconstitutional because it deprived Appellees and others of Equal Protection of the laws, in violation of the 14th Amendment to the Constitution. The Court directed the Appellants to reinstate aid to children declared ineligible under the Regulation (59-60).

The Appellants appealed to this Court, and probable jurisdiction was noted January 22, 1968.

Interest of Amici

The National Council of the Churches of Christ in the U. S. A. is a membership corporation organized under New York law. It represents 34 Protestant and Orthodox Churches in the United States and the churches represented by the Council have a total membership of approximately 42 million people. The Council believes it has the duty to present its position on the issues in this case, which issues so directly and adversely affect the lives and subsistence of children in need.

The Child Welfare League of America, Inc. is a national, non-sectarian federation of 360 child welfare agencies in the United States and Canada. It also is organized under the New York Membership Corporation Law. The League devotes its efforts to the improvement of services for deprived, neglected, dependent children in the United States. It functions by providing leadership and services to child welfare agencies and organizations. The Child Welfare League seeks to file a brief in this case because it considers the Alabama regulation an unconstitutional invasion of rights the League is dedicated to protect.

Point I

The Alabama Regulation which deprives destitute children of government support because of their mother's sexual activities, violates the Due Process Clause of the Fourteenth Amendment.

A civilized society, particularly an affluent one such as ours, has the obligation and responsibility to make adequate provision for the support of destitute children. Children in that condition who receive government support are not the recipients of alms. They have, at the least, a right to subsistence.

In *Edwards* v. *California*, 314 U. S. 160, this Court said in recognizing the obligations of both the State and Federal governments to provide support for those in need:

> "Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. *The duty to share the burden*, if not wholly to assume it, has been

> recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind and dependent children" (emphasis ours) (314 U. S. at pp. 174-175).

See also Hans Linde, Constitutional Rights In the Public Sector: Justice Douglas on Liberty In the Welfare State, 40 Wash. L. Rev. 10, 17; Charles A. Reich, Individual Rights and Social Welfare, The Emerging Legal Issues, 74 Yale Law Journal 1245, 1246.

The Constitution recognizes and protects against government invasion such rights as that of a parent to teach his child a foreign language (*Meyer* v. *Nebraska*, 262 U. S. 390, 399), the right of a citizen to pass freely from State to State (*Twining* v. *New Jersey*, 211 U. S. 78, 97), the right to travel abroad (*Aptheker* v. *Secretary of State*, 378 U. S. 500), the right to enter public lands (*United States* v. *Waddell*, 112 U. S. 76), the right to own land (*Oyama* v. *California*, 332 U. S. 633, 640), the right to have children (*Skinner* v. *Oklahoma*, 316 U. S. 535), and to direct their education (*Pierce* v. *Society of Sisters of Holy Names*, 268 U. S. 510), the right to practice one's profession or follow a calling (*Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-239; *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192), the right to marry (*Loving* v. *Virginia*, 388 U. S. 1, 12), and the right of marital privacy (*Griswold* v. *Connecticut*, 381 U. S. 479). Clearly so fundamental a right as that of a child whose parents cannot support him, to be sustained by the State, is also within the protection of the Constitution.

In this case, the right of the Smith children to financial help had been recognized by statute. The Federal government granted funds to Alabama (under the Social Security Act) for aid to dependent children, and Alabama undertook a program pursuant to its own statute (Code of Alabama Title 49, Section 17 [14]) to furnish such aid (7, 44-45). As a result, the question here is not only what government must give, but also what it may not take away.*

Even if financial aid to dependent children is deemed a benefit conferred by the government and not a right, the withholding of benefits under an arbitrary regulation which has no reasonable relation to any proper legislative purpose and is "utterly lacking in rational justification" violates the Constitutional requirement of Due Process. *Flemming* v. *Nestor,* 363 U. S. 603, 611; *Nebbia* v. *New York,* 291 U. S. 502, 537; *Meyer* v. *Nebraska,* 262 U. S. 390, 399-403. It will be seen that the Regulation has no relation to any valid legislative purpose.

According to the Appellants the primary purpose of the Regulation limiting the number of dependent children eligible for relief is to conserve the available welfare funds so that those who remain on the rolls will receive larger allowances.** That may be the result of the measure, but it cannot be held the valid objective of a law governing the distribution of welfare funds.*** Obviously the exclusion of

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* See *Barsky* v. *Board of Regents of N. Y.,* 347 U. S. 442, 473.

** Appellant's brief p. 14.

"In applying this Regulation the ADC (aid to dependent children) caseload was reduced. Payments to families who continue to receive the payments have been increased. The caseload per caseworker has been reduced" (Appellants' brief, p. 15).

*** The alleged necessities of the program cannot be held to justify an unconstitutional limitation. *Hoeper* v. *Tax Commission,* 284 U. S. 206, 216-217.

any group from public assistance will increase the amount left for those who remain eligible. But that could not serve as justification for declaring, for example, that all Negroes, or all who do not attend a recognized church, are ineligible for relief.

The second stated purpose of the Regulation is to shift the burden of supporting dependent children from the State to one who may be considered a "substitute father" because he enjoys a relationship akin to that of marriage, with their mother (Appellants' brief, pp. 20-22). The Regulation assumes, as the Court below observed, that "from the mother's alleged sexual relationship the man has assumed the role of father to her children . . . ". The assumption and the supposed aim of the Regulation bear no relation to its provisions, which deny all aid to dependent children whether the "substitute parent" is willing, or is able, or can be required to contribute to their support or has ever lived with the children, or has ever seen them.

Another alleged objective of the Regulation is to reduce the risk of conception of dependent children the State may have to support (Appellants' brief, pp. 14, 28). A State may not adopt a measure to limit the birth rate of poor people. *Skinner* v. *Oklahoma,* 316 U. S. 535. Moreover the Regulation cannot be considered a rational means of achieving that result. The Regulation is confined, according to its terms, to children whose mother cohabits with an "able-bodied man" and, as interpreted by the Appellants, the Regulation is applied only when the sexual relations between the dependent children's mother and an able-bodied man are "regular, frequent, or continuous" * (Appellants'

* The term "continuous" is precise, but has, we assume, very limited application. The terms "frequent" and "regular" are so

brief, pp. 25, 28). There is little likelihood that the alleged objective of the Regulation (to minimize the risk of conception of dependent children) can be realized so long as it does not inhibit cohabitation between indigent women and men who are maimed, blind, or halt and does not affect occasional sexual intercourse between a mother of dependent children and a multitude of men.

Point II

The Regulation is invalid because it denies appellees and others in the same situation the Equal Protection of the laws.

The Equal Protection clause prohibits "discriminating and partial legislation . . . in favor of particular persons as against others in like condition." *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26, 28-29. The Clause does not require a law to make identical provision for all affected by it, but it does demand where distinctions are made, that they have some valid and reasonable relation to the law's purposes and that there be some rational basis for the discrimination. *Gulf, C. & S. F.R. Co.* v. *Ellis,* 165 U. S.

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vague and general as to permit arbitrary application since each administrator of the Regulation must determine the meaning for himself. (See *Louisiana* v. *United States,* 380 U. S. 145.) The Appellant, Ruben King, one of the drafters of the Regulation, and Lucy K. Locklin and Augusta Wilkinson, County Directors of the Alabama Welfare Department, all agreed that the meaning of the terms varied in each case. They stated that depending on the person to whom it was applied, the term "frequently" might refer to sexual intercourse once a week, once a month or once in two or three months (84, 170, 180-181).

The Appellants contend that the vice of vagueness of the terms "frequent" and "regular" in the Regulation is cured by "consistent interpretation", namely, "application in accordance with the facts of each situation" (Appellants' brief, p. 9).

150, 155; *Smith* v. *Cahoon,* 283 U. S. 553; *Baxtrom* v. *Herold,* 383 U. S. 107, 111; *Rinaldi* v. *Yeager,* 384 U. S. 305, 308-309.

The Court below held, in declaring the Regulation invalid: "It is clear that Alabama, having undertaken to cooperate with the federal government in providing an Aid to Dependent Children program and having accepted federal financial assistance for that purpose, is not now free to bestow the benefits of the program upon some needy children and arbitrarily to deny them to others. There cannot be any picking and choosing of the mothers and children who will be aided if it is done in an irrational or in an arbitrary manner. Some children cannot be classified as eligible and others ineligible without a reasonable basis for distinguishing one class from the other • • • ."

The Alabama Regulation challenged in this case distinguishes between dependent children whose mothers are chaste, and those whose mothers are not, and it denies all welfare payments to the latter group. There is no rational basis for denying relief to dependent children because of their mother's sexual behavior. And the objective of the Social Security Law and of the Alabama Aid to Dependent Children law, both enacted to furnish support for needy children, is obviously not served by the distinction.

In *Collins* v. *State Board of Social Welfare,* 248 Iowa 369, 81 N. W. 2d 4, the Iowa Supreme Court struck down an amendment to a welfare law that limited to $175 the amount that could be given to dependent children residing in one home. As a result of the amendment, dependent children of large families received less per child than those of smaller families. The Court found that the law deprived the children of larger families of Equal Pro-

tection of the laws, for the difference in the treatment of children of larger families did not bear any reasonable relation to the purposes of the law.

The same result was reached in *Harrell* v. *Tobriner*, U. S. Ct. App. D. C., November 7, 1967, 36 USLW 2283. That case involved a law that provided aid to indigent mothers and their children within the District of Columbia only if they lived in the District for at least 12 months. The Court held:

> "If a six-month resident is denied the assistance given to a one-year resident, in circumstances in which each is otherwise within the requirements of the statute, the former is denied the equal protection of the law, for the clearly different treatment has no reasonable relation to the basic legislative purposes. The disqualifying requirement applicable to plaintiffs thus engrafts upon the legislation an invalid provision. The same reasons which led the courts in the Thompson v. Shapiro, 270 F. Supp. 331, and Green v. Dept. of Public Welfare, 270 F. Supp. 173, and pendente lite in the Smith v. Reynolds (USDC EPa 1967), to hold comparable provisions invalid as classifications without a reasonable relation to the purposes of the legislation, apply to our cases. • • • "

The distinction made by the Regulation here under attack certainly bears no greater relevance to the objectives of the welfare law than those held to violate the demands of the Equal Protection Clause in the *Collins* and *Harrell* cases.

As noted in the first point the penalties of the Regulation do not fall equally upon the dependent children of mothers

who cohabit regularly with able-bodied men, and dependent children of mothers who have infrequent sexual relations with many men, or who have sexual intercourse with men who are not able-bodied. As the Court said in *Skinner* v. *Oklahoma,* 316 U. S. 535, referring to a statutory provision for the sterilization of multiple offenders convicted of larceny, but not those convicted of embezzlement:

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 US 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins, supra; Missouri ex rel. Gaines v. Canada, 305 US 337. * * * The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn" (316 US at pp. 541-542).

Conclusion

The Regulation deprives dependent children of subsistence in order to accomplish purposes that are not valid, by means that are arbitrary, discriminatory and "utterly lacking in rational justification." It deprived the Appellees and 16,000 others of fundamental rights and of their statutory rights without due process of law and denied them the Equal Protection of the laws. For the reasons outlined, the judgment of the Court below should be affirmed.

Respectfully submitted,

HELEN L. BUTTENWIESER
Attorney for Amici

EPHRAIM LONDON
Of Counsel

On the Brief

HELEN L. BUTTENWIESER
EPHRAIM LONDON